IN THE

SUPREME COURT

OF THE

UNITED STATES

JAMES C. DAVIS,
Agent, United States Railroad Administration,
Petitioner,

vs.

THE PORTLAND SEED COMPANY,
a Corporation,
Respondent.

MOTION FOR WRIT OF CERTIORARI

The petitioner herein, James C. Davis, Agent, by his counsel, moves this Honorable Court that it shall by certiorari, or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Circuit Court of Appeals lately pending, wherein the petitioner, James C. Davis, Agent, was plaintiff in error,

and the respondent, The Portland Seed Company, a corporation, was defendant in error, and to that end it now tenders herewith its petition and brief, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

ARTHUR C. SPENCER,
JOHN F. FINERTY,
CHARLES E. COCHRAN,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES C. DAVIS,
Agent, United States Railroad Administration,
Petitioner,

vs.

THE PORTLAND SEED COMPANY,
a Corporation,
Respondent.

NOTICE OF APPLICATION FOR WRIT OF CERTIORARI

The respondent, THE PORTLAND SEED COMPANY, is hereby notified that the petitioner, James C. Davis, Agent, on Monday, the ..... day of ....., 1922, upon its verified Petition and a copy of the entire record in this cause at the opening of the Court on that day, or as soon thereafter as counsel can be heard, will submit a motion, (a copy of which and of the petition for writ of certiorari and brief in support thereof are herewith delivered to you) to the Supreme Court of the United

States in its Courtroom at the Capitol in the City of Washington, D. C.

ARTHUR C. SPENCER,
JOHN F. FINERTY,
CHARLES E. COCHRAN,
Attorneys for Petitioner.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the Petition for Writ of Certiorari and Brief in support of the Petition, are hereby acknowledged this 2 day of January, 1922.

.....

Attorney for Respondent.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES C. DAVIS,
Agent, United States Railroad Administration,
Petitioner,

vs.

THE PORTLAND SEED COMPANY,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Supreme Court of the United States:

The petition of JAMES C. DAVIS, Agent, United States Railroad Administration, respectfully shows:

I.

By an action at law lately pending in the District Court of the United States for the District of Oregon, the respondent recovered a judgment against petitioner for the sum of Five Hundred Forty-Eight and 96/100 ($548.96) Dollars, with interest at the rate of six per cent (6 per cent) per annum on the sum of Three Hundred Seventy-one and 09/100

($371.09) Dollars from January 8, 1919, and with interest on the sum of One Hundred Seventy-seven and 87/100 ($177.87) Dollars at the rate if six per cent per annum from the 24th day of January, 1919, and the further sum of One Hundred Seventy-five ($175.00) Dollars as attorney's fees, together with costs and disbursements upon a cause of action set forth in its complaint, the substance and gravamen of which is the following:

(a) The respondent, a corporation of the State of Oregon, on or about the month of December, 1918, purchased from E. W. Mitchell at Roswell, New Mexico, two carloads of alfalfa seed. The said Mitchell on December 19th, 1918, delivered to your petitioner at Roswell, New Mexico, one carload thereof, which your petitioner accepted, agreed to and did transport over the lines of the Atchison, Topeka & Santa Fe Railroad Company from Roswell, New Mexico, to Denver, Colorado; thence via the lines of the Union Pacific Railroad Company to Granger, Wyoming; thence via the lines of the Oregon Short Line Railroad Company to Huntington, Oregon, and thence via the lines of Oregon-Washington Railroad & Navigation Company to Yakima, Washington, and there delivered same to the respondent.

which shipment will be hereinafter called the "Yakima shipment". The said Mitchell also on or about January 4, 1919, did deliver to your petitioner an additional carload of alfalfa seed, which petitioner accepted, agreed to and did transport over the lines of the aforesaid railroad companies to Walla Walla, Washington, and there delivered same to the respondent, which shipment will be hereinafter called the "Walla Walla Shipment". The lines of railroad of the aforesaid companies were in possession and under the control of the Government of the United States, under the acts of Congress relating to the Federal Control of Railroads and were operated by a predecessor of your petitioner called herein "United States Railroad Administration."

(b) The Railroad Administration assessed and collected freight charges, including war tax, against the Yakima shipment the sum of One Thousand Three Hundred Eleven and 75/100 ($1311.75) Dollars, and in respect to the Walla Walla shipment, including war tax, the sum of Seven Hundred Fifteen and 79/100 ($715.79) Dollars, which the respondent paid. There was no through rate in effect at the time of the movement from Roswell, New Mexico, to Walla Walla and Yakima, Washington, respectively, and the freight charges as finally

collected were made up of the combination of local rates through Denver, Colorado, which aggregated the sum of Two and 44|100 ($2.44) Dollars per cwt.

(c) At the time said shipments moved there was established and in effect over the lines of railway above stated from Pecos, Texas, to Walla Walla and Yakima, Washington, respectively, a rate of One and 51½|100 ($1.51½) Dollars per cwt. Pecos, Texas, is a point on the line of railroad of the Atchison, Topeka & Santa Fe Railroad Company, more distant from Walla Walla and Yakima, Washington, over the route by which said shipments moved than Roswell, New Mexico. The United States Railroad Administration did not apply to the Interstate Commerce Commission and secure authority to charge less for the transportation of property from Pecos, Texas, to points in the State of Washington, including Walla Walla and Yakima, than for the transportation of said property to said points from Roswell, New Mexico, over the same line or route.

(d) The premises considered, respondent concludes your petitioner violated Section 4 of the Act to Regulate Commerce in assessing and collecting the aforesaid sums of money as

freight charges on said shipments, although there was no proof that your petioner assessed or collected any charges whatsoever for a transportation movement of property from Pecos, Texas, to Yakima and Walla Walla, respectively, over the same line or route the two carloads of alfalfa seed actually moved to those points from Roswell, New Mexico. In fact, there was no such movement from Pecos, Texas. As a further conclusion, respondent claims that by virtue of the facts constituting the transaction the only lawful rate properly assessable against the shipment from Roswell, New Mexico, to the respective points of destination was the rate to such points from Pecos, Texas, namely: One and 51½|100 ($1.51½) Dollars per cwt., on which basis the lawful rate, including war tax, on the Yakima shipment did not exceed Nine Hundred Forty and 66|100 ($940.66) Dollars, nor upon the Walla Walla shipment the sum of Five Hundred Thirty-seven and 92|100 ($537.92) Dollars, and judgment against your petitioner was prayed for in sums on the Yakima shipment of the difference between One Thousand Three Hundred Eleven and 75|100 ($1311.75) Dollars, the amount collected, and the sum of Nine Hundred Forty and 66|100 ($940.66) Dollars, the amount which should have been collected, equaling Three Hundred

Seventy-one and 09|100 ($371.09) Dollars, and the Walla Walla shipment, the difference between Seven Hundred Fourteen and 79|100 ($714.79) Dollars, the amount collected, and the sum of Five Hundred Thirty-seven and 92|100 ($537.92) Dollars which should have been collected, equaling the sum of One Hundred Seventy-seven and 87|100 ($177.87) Dollars, which two sums aggregate Five Hundred Forty-eight and 96|100 ($548.96) Dollars, in which sum the respondent claims to have been damaged because of the violation of Section 4 of the Interstate Commerce Act known as the Long and Short Haul clause, and entitled to recover same from your petitioner in virtue of Section 8 of the Act to Regulate Commerce, together with attorney's fees, to be taxed as part of the costs of the case.

II.

The cause of action was tried in the District Court of the United States for the District of Oregon. There was no dispute that the shipments were made, the tariffs naming local rates from Roswell, New Mexico, to points of destination, which aggregated Two and 44|100 ($2.44) Dollars, and the tariff naming a through rate from Pecos, Texas, to such points of destination were duly published and filed with the Interstate Commerce Commission as

required by Section 6 of the Interstate Commerce Act. It was also an undisputed fact that petitioner did not, prior to the movement in question, secure authority from the Interstate Commerce Commission to charge less for a transportation movement from Pecos, Texas, to Yakima and Walla Walla, Washington, respectively, than from Roswell, New Mexico, over the same line or route, and it was also a fact, undisputed, that Pecos, Texas, is a point more distant from Walla Walla and Yakima, Washington, respectively, over the aforesaid lines and route than Roswell, New Mexico.

III.

At said trial your petitioner made the following contentions:

(a) The District Court had no jurisdiction of the above cause of action, because the same was controlled by Section 206 (c) of the Transportation Act, 1920, in that said cause of action essentially was one praying for reparation on account of damage claimed to have been caused by reason of the collection of rates and charges in violation of the Interstate Commerce Act.

(b) Because there was no proof other than the difference between the amounts collected

based on the local rate from Roswell, New Mexico, to points of destination of Two and 44/100 ($2.44) Dollars per cwt., and the amount which would have been collected if the through rate from Pecos, Texas, had been applied of One and 51½/100 ($1.51½) Dollars per cwt., of the amount of damages sustained as required by Section 8 of the Interstate Commerce Act.

(c) In short, the difference between the rate from Roswell, New Mexico, to the points of destination and the rate from Pecos, Texas, the more distant point, applied to the shipment, is not the proper measure of damages for a violation of Section 4 of the Act to Regulate Commerce recoverable in virtue of the provisions of Section 8 of such Act.

(d) The sole jurisdiction of causes of action, the gravamen of which is alleged violation of Section 4 of the Interstate Commerce Act, is with the Interstate Commerce Commission, since if the higher rate to the less distant point is unlawful, although duly published and filed with the Interstate Commerce Commission, then there is no lawful rate under which the shipments herein may move until a lawful tariff naming such rates shall have been published and filed with the Interstate Commerce Commission. It was the duty of the respondent to

submit the entire question to the Interstate Commerce Commission, secure the establishment of a lawful rate and request reparation for the amount of damages which he may have been able to prove, and for this reason the courts have no jurisdiction until after the Interstate Commerce Commission shall have made a reparation award.

IV.

The District Court overruled the contentions of your petitioner and on June 1, 1921, entered a judgment in favor of the respondent and against your petitioner for the amount prayed for and taxed as costs a further sum of One Hundred Seventy-five ($175.00) Dollars as attorney's fees.

V.

Your petitioner thereupon caused the record in said case to be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit on writ of error. Said action was consolidated for trial in the Circuit Court of Appeals with the cases of James C. Davis, Agent, plaintiff in error, vs. A. J. Parrington, defendant in error, and The San Francisco & Portland Steamship Company, plaintiff in error, vs. A. J. Parrington, defendant in error, which two cases involve among other questions, the same questions dis-

closed by the record in this case. Upon completion of the joint trial of said three causes in the United States Circuit Court of Appeals, for the Ninth Circuit, the same were taken under advisement by said court, and on June 5, 1922, a joint opinion was filed and several judgments entered, among which was a judgment affirming the judgment of the District Court of the United States for the District of Oregon in the above entitled action, with a further sum of One Hundred ($100.00) Dollars as attorney's fees ordered taxed as a part of the costs in that court pursuant to Section 8 of the Interstate Commerce Act. Respondent made the same contentions in the Circuit Court of Appeals in each of said cases as were made in the District Court, and said Court in affirming the judgment of the District Court erroneously overruled and denied the same.

VI.

The jurisdiction of the Court in each of these three cases was based upon Section 24, Paragraph 8, of the Judicial Code, which provides district courts shall have original jurisdiction, "Eighth. Of all suits and proceedings arising under any law regulating commerce."

In the cases of James C. Davis, Agent, plaintiff in error, vs. A. J. Parrington, defen-

dant in error, and The San Francisco and Portland Steamship Company, plaintiff in error, vs. A. J. Parrington, defendant in error, which were jointly tried in the Circuit Court of Appeals with this case, the amount involved exceeded the sum of One Thousand Dollars besides costs, and the cases did not fall within the provisions of Section 128 of the Judicial Code, whereby the judgments of said Circuit Court of Appeals were final; whereupon your petitioner herein, as plaintiff in error in said two cases, prosecuted a writ of error to the Supreme Court of the United States under the authority of Section 241 of the Judicial Code.

VII.

Your petitioner has no right of appeal or writ of error herein to this Honorable Court because the amount involved herein does not exceed the sum of One Thousand Dollars, besides costs. The Circuit Court of Appeals stayed its mandate until the 31st day of August, 1922, to give time for the presentation and determination of this petition. Your petitioner presents herewith, as a part of this petition, a brief showing more fully its views upon the questions involved, and a transcript of the record in the Circuit Court of Appeals.

VIII.

The petitioner is entitled to have its prayer for a Writ of Certiorari granted for the following reasons:

(a) The decisions of the Circuit Court of Appeals for the Ninth Circuit in this and the two companion cases jointly argued, submitted and decided with it respecting the character of proof and measure of damage for a violation of the Long-and-Short Haul Rule of the fourth section of the Act to Regulate Commerce, are in conflict with a long line of decisions on the same subject by the Interstate Commerce Commission. For example, the Circuit Court of Appeals for the Ninth Circuit in the case of Southern Pacific Company vs. California Adjustment Company, 237 Federal Reporter, 954, was an action for damages against the carrier for a violation of Section 21 of the California Constitution, as amended October 10, 1911, which provision of said constitution is *in haec verba* of Section 4 of the Act to Regulate Commerce, and the Court at page 965 of the Report held the Adjustment Company by the very nature of the transaction damaged in an amount equal to the difference between the rate from the more distant point to destination than from the intermediate point to the same destination, and allowed a recovery in virtue of Section 73 (a)

of the Public Utilities Act of the State of California, which is in substance the same as Section 8 of the Interstate Commerce Act. The facts in the Seed Company case are set out in the opinion of the Circuit Court of Appeals on page 102 of the Transcript, and following the decision in the case of California Adjustment Company vs. Southern Pacific Company, 237 Federal, 954, the Circuit Court of Appeals in its opinion at page 111 of the Transcript in this case said:

> "Another point advanced by the plaintiffs in error is that the difference between the rate to North Portland and to Portland is improperly used as a measure of damages. The question is like that presented to this Court in California Adjustment Company vs. Southern Pacific Co., 237 Fed. Rep., 954, where it was held that the rule adopted by the District Court is the correct one. In its essential respect, the case of the Seed Company is covered by what we have said of the Parrington cases, where the rates appear to have been made in violation of the Long-and-Short-Haul clause."

No cases construing the Long-andShort-Haul clause of the Interstate Commerce Act with respect to the measure of damages for its violation (to the extent of our research) have been

made by any other Federal Court. The views of the Interstate Commerce Commission upon the same question supports the rule as follows:

> "In the absence of proof of the damage to the shipper, the fact that carriers have charged or received rates which violate the Long-and-Short-Haul rule of the 4th Section of the Act is not of itself a sufficient basis for an award of reparation."
>
> Oregon Fruit Co. vs. Southern Pacific Co., 50 I. C. C. 719.
>
> Nix & Co. vs. Southern Railway Co., 31 I. C. C., 145, 149.
>
> Chattanooga Implement & Mfg. Co. vs. L. & N. R. R. Co., 40 I. C. C., 146.
>
> LaCrosse Shippers' Assn. vs. C. I. & L. Ry. Co., 43 I. C. C., 520, 524.
>
> United States Glue Co. vs. C. & N. W. Ry. Co., docket No. 6832, unreported.

Petitioner alleges, therefore, that the opinions and decisions of the Circuit Court of Appeals in this and its companion cases are strictly in conflict with the opinions and practices of the Interstate Commerce Commission for many years, and it is undoubtedly in the public interest that this Honorable Court declare the true rule in the premises.

(b) The District Court, as well as the Circuit Court of Appeals in the cases, have regarded them as being substantially actions to recover money which the carrier has illegally exacted, and since the same could have been maintained against the carrier if the lines had been in private control at the time the shipments were made, they can proceed against the agent of the President with reference to the shipments moving during the period of Federal control as declared in Section 206(a) of the Transportation Act, 1920.

> See opinion District Judge Bean, Trans. 34. Also opinion Circuit Judge Hunt, Trans. 107.

But it is submitted there is error in holding this and its companion cases to be

> "Actions at law * * * based on causes of action arising out of the possession, use or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act or of the Act of August 29, 1916)"

of the character which could have been brought against the carrier, etc., as contemplated by Section 206(a) of the Transportation Act as distinguished from cases wherein complaints are brought praying "for reparation on account of

damage claimed to have been caused by reason of the collection during the period of Federal control of rates * * * in violation of the Interstate Commerce Act," as defined by Section 206(c) of the Transportation Act. In short, the cases are not of the type referred to in Section 206(a) of the Transportation Act, but are clearly cases falling within Section 206(c) of the Transportation Act, 1920, in that they seek damages by reason of the collection of rates in violation of the Interstate Commerce Act. If they are classified as instanced in the latter section, the jurisdiction to hear same is lodged with the Interstate Commerce Commission, because the section provides those complaints "may be filed with the Commission" within a certain period of time after Federal control ceased. It is important to the United States Railroad Administration and petitioner as the Agent of the President, and, therefore, important to the Government and people of the United States, that the question arising out of the conflict of the jurisdiction of the courts and Commission in view of Sections 206a) and 206(c) be set at rest by the opinion of this Honorable Court.

Numerous actions involving large amounts of money have been begun against your petitioner in various forums throughout the United

States and the course of the decisions on the question therein depend upon the views of this Court as declared in the Parrington cases reaching this court on writs of error and in this case if the Court shall have issued the writ prayed for. Moreover, if in the decision upon the writs of error prosecuted in the Parrington cases decided jointly in the Circuit Court of Appeals with this case, the judgments of the Circuit Court of Appeals are reversed, the principles announced therein will not control the decision in this case unless this Court shall require by certiorari or otherwise the case certified to the Supreme Court for its review and determination according to the power and authority declared in Section 240 of the Judicial Code.

WHEREFORE, in view of the premises, petitioner prays that this Honorable Court will grant its Writ of Certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit requiring the record of said cause in said Court and its judgment be certified to this Court, and that this Honorable Court will thereupon proceed to correct the errors complained of, reverse the said judgment and remand the cause and give to your petitioner such other and further relief as the nature of the

case may require and to the Court may seem proper in the premises.

ARTHUR C. SPENCER,
JOHN F. FINERTY,
CHARLES E. COCHRAN,
Attorneys for Petitioner.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON. ss.

CHARLES E. COCHRAN, being first duly sworn, states:

That he is one of the Attorneys for the petitioner and has read the foregoing petition subscribed by him; knows the contents thereof, and the facts therein stated are true, except those stated upon information and belief, and as to such he believes the same to be true.

.....

Subscribed and sworn to before me this..... day of August, 1922.

.....

Notary Public for Oregon.

My commission expires .....

I HEREBY CERTIFY that I have examined the foregoing Petition, and that in my opinion it is well founded as to matters of fact and law, and that this case identified thereby is one and is such that the prayer of the petition should be granted by this Honorable Court.

.....

BRIEF OF PETITIONER IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

During December, 1918, and January, 1919, E. W. Mitchell of Roswell, New Mexico, delivered to the Director General of Railroads, two carloads of alfalfa seed consigned to shippers' order, notify Portland Seed Company, one car destined to Yakima and the other to Walla Walla, Washington, which moved over the lines of the Atchison, Topeka & Santa Fe Railroad Company to Denver, Colorado; thence via the line of the Union Pacific Railroad Company to Granger, Wyoming; thence via the Oregon Short Line Railroad Company to Huntington, Oregon, and thence via the Oregon-Washington Railroad & Navigation Company to points of destination. Upon arrival of said two cars at the respective points of destination the notify party was duly notified and who surrendered the bills of lading properly endorsed (see Plaintiff's Exhibits 1 and 2, Trans. 69). The Director General collected for the Yakima shipment the sum of one thousand three hundred eleven and 75/100 ($1,311.75) dollars, and for the Walla Walla shipment the sum of seven hundred fifteen and 79/100 ($715.79) dollars. The duly filed and published rate on

alfalfa seed in carload moved from Roswell, New Mexico, to Yakima and Walla Walla, Washington, two and 44/100 ($2.44) dollars, per cwt., which was the amount petitioner actually charged (Trans., p. 56). This rate is a combination of local rates from Roswell to Denver, and from Denver to Walla Walla and Yakima, and was the rate actually charged. The through rate from Pecos, Texas, to Walla Walla and Yakima, Washington, was one and 51½/100 ($1.51½) dollars per cwt. (Trans., 53.) The excess of the Roswell rate over the Pecos rate when applied to the quantity of alfalfa shipped amounts to the sum of five hundred forty-eight and 96/100 ($548.96) dollars, which was the amount prayed for, plus attorney's fees, interest and costs. Because Pecos, Texas, was a point more distant than Roswell, New Mexico, on the same line or route over which the shipments moved, it was claimed any sum collected in excess of the Pecos rate was in violation of Section 4 of the Long-and-short-haul clause of the Interstate Commerce Act.

The case was tried before the court. The intervention of a jury waived by written stipulation. Judgment against petitioner in the amount prayed for was obtained, together with the sum of one hundred seventy-five ($175.00) dollars as attorney's fees (Trans., 43). The

complaint setting forth the cause of action as above appears at page 6 of the Transcript. To this complaint a demurrer was filed, alleging the court had no jurisdiction of the subject matter of the action (Trans., 24). This demurrer was overruled (Trans., 26), and an answer filed (Trans., 18). Upon the trial the facts alleged in the complaint were established and an issue upon law was made, your petitioner contending as set forth in its petition for the Writ of Certiorari.

POINTS

I.

An inspection of the complaint and a consideration of the undisputed facts disclose this case to be within Section 206 (c) of the Transportation Act, which reads, in part, as follows:

> "(c). Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection . . . during the period of Federal control, of rates . . . in violation of the Interstate Commerce Act, may be filed with the Commission within one year after the termination of Federal control against the agent designated by the President, under subdivision 'a' naming in the petition," etc., certain facts.

Under this statute it was the duty of the respondent to file his complaint with the Interstate Commerce Commission. If that was done the subject matter of the complaint and the questions tendered thereby would have been decided according to the rules, practices and opinions of the Interstate Commerce Commission. The Commission has long been of opinion, in the absence of proof of damage to the shipper, the fact that carriers have charged or received rates which violate the Long-and-short-haul rule of the fourth section of the Act is not of itself sufficient basis for an award of reparation.

Oregon Fruit Co. v. Southern Pacific Co., 50 I. C. C., 719.

Nix & Co. v. Southern Railway Co., 31 I. C. C., 145, 149.

Chattanooga Implement & Mfg. Co. v. L. & N. R. R. Co., 40 I. C. C., 146.

LaCrosse Shippers' Ass'n. v. C., I. & L. Ry. Co., 43 I. C. C. 520, 524.

United States Glue Co. v. C. & N. W. Ry. Co., docket No. 6832, unreported.

In point of fact there were no shipments of alfalfa sent from Pecos, Texas, to Walla Walla or Yakima, Washington, or to Northwest points, nor as far as any other point is con-

cerned so far as petitioner is informed during the period of Federal control. The record fails to show any such shipments. If respondent's rights and remedies are governed by the rules laid down by the Interstate Commerce Commission, he will have been compelled to offer proof of damage differing and apart from the mere fact of charging the Roswell rate when there was also effective the Pecos rate in a lesser amount. The respondent cannot show damage of the type required by the rules of the Interstate Commerce Commission. If such rules control the measure of the Government's obligation, then it has no obligation to respondent, or any other shipper, for a sum equivalent to the excess between the two rates applied to the two shipments, and to allow these cases to remain in judgment based upon a record disclosing absence of the required proof according to the rules laid down by and opinions of the Interstate Commerce Commission, is to require your petitioner, as a successor of the U. S. Railroad Administration, to pay Government funds in accordance with erroneous principles of law.

II.

The jurisdiction of the courts in cases of this type is to be determined from an inspection of Sections 206a and 206c of the Transportation Act of 1920.

We may safely assume, that but for those two sections, no actions, suits or proceedings of any kind can be now brought against the Government of the United States respecting causes of action arising during and under Federal control of railroads. Those sections constitute the Government's consent to be sued, and obviously the consent is given only to actions of the character mentioned in those two sections, and also only in the forums prescribed by those sections. Section 206a refers only to actions at law, suits in equity or proceedings in admiralty based on causes of action arising out of the *possession, use and operation* by the President of these railroads, if such actions, suits or proceedings could have been brought against the railroad company whose lines were under Federal control. Damages caused by the collection of rates, the enforcement of regulations or establishment of classifications and practices which were in violation of (a) Sections 1, 2 or 3 of the Interstate Commerce Act by being unjust, unreasonable, unjustly discriminatory or unduly or unreasonably prejudicial, or (b) otherwise in violation of the Interstate Commerce Act may be recovered by filing the complaint with the Interstate Commerce Commission within a certain time as provided in Section 206c of the Transportation Act.

If a cause of action, but for Federal control, is to be propounded in the courts because of acts "in violation of the Interstate Commerce Act," that is, an action authorized by Section 8 thereof, and many of them have been, then it must follow the procedure in such cases has been modified by Section 206c requiring such cause of action to be filed with the Interstate Commerce Commission. There is error in the opinion of the Circuit Court of Appeals in holding to the contrary (see opinion, Judge Hunt, Trans., 107), for if Section 206a expresses the general consent of the Government to be sued in the courts, then Section 206c must be held a modification of the general consent, to the extent of providing the forum where suits based upon the "violation of the Interstate Commerce Act" may be brought. It is a canon of statutory construction that general provisions must give way to specific provisions, or to restate the question concretely, that the special directions of Section 206c that cases for a violation of the Interstate Commerce Act must be filed with the Interstate Commerce Commission controls such cases, notwithstanding the more general provisions of Section 206a.

Principles contended for find support in the cases of

Rogers v. U. S., 183 U. S. 83, 87.

In re Anderson, 214 Fed. 662.

Congress certainly never intended claims for charges over the legal tariff charge, and that is all a violation of the fourth section can be, should be sued on in the courts. The records of the Interstate Commerce Commission show that more than forty-five thousand such claims have been filed with the Interstate Commerce Commission. If Congressional intention on the subject was doubtful, it has been set at rest by the amendment to the Transportation Act, 1920, approved February 24, 1922, which is an act entitled "An act to amend Subdivisions (a) and (c) of Section 206 of the Transportation Act, 1920."

This amendment added the words,

> "Or if so claimed in respect of overcharges above the legal tariff charge."

Then such acts in violation of the Interstate Commerce Act should be filed with the Commission "within two years and six months after the termination of Federal control" instead of one year as was previously provided.

Section 206c further provides,

> "The Commission is hereby given jurisdiction to hear and decide such complaints

in the manner provided in the Interstate Commerce Act," etc.

Therefore, whether the action could have been brought against the carrier but for Federal control, and even though it may arise "out of the possession, use or operation by the President of the railroad or systems of transportation of the carrier," and be of such character as prior to Federal control could have been brought against the carrier company as provided by Section 206a, it must now be brought against your petitioner as agent of the President in the manner prescribed by Section 206c.

The claim has been made as intimated in the case of *Southern Pacific Company v. California Adjustment Co.*, 237 Fed. 954, that this was merely an action to recover money illegally exacted, but this contention is unsound, for otherwise attorney's fees could not have been taxed as part of the costs. The authority whereby to recover attorney's fees as part of the costs, is found in Section 8 of the Interstate Commerce Act, and that section solely creates liability for damages "sustained in consequence of any such violation of the provisions of this act," meaning the Act to Regulate Commerce. It follows that if the District Court and Circuit Court of Appeals are correct in holding

this to be an action to recover money illegally exacted under authority of *California Adjustment Co. v. Southern Pacific Company*, 237 Fed. 954, then it was not an action authorized by Section 8 of the Interstate Commerce Act, and attorney's fees cannot be taxed as part of the costs. The judgments are, therefore, erroneous under that theory to the extent of the attorney's fees so taxed.

III.

It was the duty of your petitioner's predecessor, the Director General of Railroads, to collect the duly published and filed tariff rate.

Bearing in mind that both the Roswell and Pecos rate to the respective destinations of these two shipments are contained respectively in duly published and filed rates, the former found in the local tariff of the Atchison, Topeka & Santa Fe Railroad Company, reading from Roswell, New Mexico, to Denver, Colorado, and the local rate from Denver, Colorado, to Yakima and Walla Walla, Washington, in the tariffs of the Union Pacific System, which includes the Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, and the latter rate found in the joint tariff published and filed by United States Railroad Administration, the question arises,

what was the legal duties of the carrier in respect to this traffic?

Paragraph 7 of Section 6 of the Interstate Commerce Act reads in part as follows:

> "Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation . . . between the points named in such tariffs than the rates, fares and charges which are specified in the tariffs filed and in effect at the time."

Departure from this statute has been uniformly condemned.

> *Louisville, etc., Ry. v. Maxwell*, 237 U. S. 94.

The violation of Section 4 of the Interstate Commerce Act arises from facts proven. It cannot be determined by an inspection of tariffs. It was the duty of the Director General of Railroads to collect the amount fixed in the tariffs. In the case before us that legal duty was performed. If such rate because of certain geographical conditions shown by evidence is violative of Section 4 of the Commerce Act when applied to traffic, and a shipper pays same, then the Director General or the carrier, as the case may be, is in the position of being

compelled by Section 6 of the Interstate Commerce Act to collect the rate, and by Section 4 prohibited therefrom. Statutes thus construed become impossible of being complied with, but are workable and may be complied with by relegating the shipper to the Interstate Commerce Commission where he may strike down the rate collected in virtue of Section 6, secure the Commission's judgment as to what is a reasonable rate on the shipment moved from the intermediate point, and if he can prove damages have been suffered, secure an award of reparation.

The Commission has long been of opinion that departures from the long-and-short-haul rule of the fourth section does not of itself prove that the rate from the intermediate point was unreasonable.

> *Stanton & Co. v. N. P. Ry. Co.*, 45 I. C. C. 583.

If that rule is correct, neither court nor commission may disapprove the Roswell rate without testimony that it was unreasonable. As thus viewed, the question becomes administrative. An administrative question applies to any practice of a carrier which gives rise to the application of a rate.

> *Northern Pacific Ry. Co. v. Solun*, 247 U. S. 477.

Texas & Pacific v. American Tie & Timber Co., 234 U. S. 138, 147.

Pennsylvania Ry. Co. v. Periton Coal Co., 237 U. S. 121, 131.

Pennsylvania Ry. Co. v. Clark Bros. Coal Mining Co., 238 U. S. 456, 469.

The Pecos rate may have been unreasonably low. The interdiction of Section 4 of the Commerce Act could have been avoided by raising the Pecos rate to a sum equal or greater than the Roswell rate. The record is silent on the reasonableness of each rate. It was the legal obligation of respondent to pay a reasonable rate on the shipments from Roswell, New Mexico, to the Washington destinations. There is no authority in this record for the court to decide the Pecos rate reasonable for a movement from Roswell, New Mexico. The entire subject is one peculiarly within the jurisdiction of the Interstate Commerce Act, and it is fundamental learning that actions in courts containing similar questions are prematurely brought prior to an award by the Interstate Commerce Commission.

IV.

It has been pointed out in our petition for the Writ of Certiorari that the decision of the

Circuit Court of Appeals for the Ninth Circuit is in conflict with a long line of decisions on the same subject by the Interstate Commerce Commission.

For a number of years the Interstate Commerce Commission has held the fact that carriers have charged or received rates which violate the long-and-short-haul rule of the fourth section of the act is not of itself a sufficient basis for an award of reparation. There must be proof of damages. The following decisions of the Interstate Commerce Commission support the principle:

Nix & Co. v. Southern Railway Co., 31 I. C. C. 145, 149.

Chattanooga Implement & Mfg. Co. v. L. & N. R. R. Co., 40 I. C. C. 146.

LaCrosse Shippers' Ass'n. v. C. I. & L. Ry. Co., 43 I. C. C. 520, 524.

Oregon Fruit Co. v. Southern Pacific Co., 50 I. C. C. 719, 722.

United States Glue Co. v. C. & N. W. Ry. Co., docket No. 6832, unreported.

Iten Biscuit Co. v. C. B. & Q. Ry. Co., 50 I. C. C. 724, 727.

Iten Biscuit Co. v. C. B. & Q. Ry. Co., 53 I. C. C. 729.

Birmingham Packing Co. v. Dir. Gen., 59 I. C. C. 81, 89.

Indian Refining Co. v. Dir. Gen., 59 I. C. C. 246, 247.

DuPont De Nemours & Co. v. Dir. Gen., 59 I. C. C. 199, 201.

The Commission was guided in announcing the above rule by the decision of this court in the case of

Pennsylvania Ry. Co. v. International Coal Co., 230 U. S. 184, 203.

Jurisdiction on certiorari has been taken under many circumstances:

(a) Because of the general effect or pressing importance of the question involved.

St. L. Ry. Co. v. Wabash Ry. Co., 217 U. S. 247.

(b) Where decisions of the Circuit Courts of Appeal are in conflict.

Hanover Star Milling Co. v. Metcalf, 240 U. S. 403.

(Note.—There would appear to be no good reason why the principle should not be extended and allow certiorari where there is a conflict

between the decisions of the Interstate Commerce Commission and the lower Federal courts in commerce cases.)

(c) Where questions of Federal jurisdiction are involved.

Atlanta Transport Co. v. Imbrovek, 234 U. S. 52.

Wells & Co. v. Castonia Cotton Mfg. Co., 198 U. S. 177.

It follows, therefore, and for these reasons, the Circuit Court of Appeals for the Ninth Circuit, as well as the District Court of the District of Oregon, are in error in respect to this case, and the same cannot be corrected unless this court by a writ of certiorari or otherwise shall require the record and judgment in this case to be certified for review that such error may be corrected, and that done in the premises what of right should be done according to the law and the practice of this court.

Respectfully submitted,

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No. 114

In the Supreme Court of the United States

OCTOBER TERM, 1922

JAMES C. DAVIS, Agent, United States Railroad Administration,

Petitioner,

vs.

THE PORTLAND SEED COMPANY, a Corporation,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals of the Ninth Circuit

BRIEF IN ANSWER TO SUPPLEMENTAL BRIEF OF DIRECTOR GENERAL

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BRIEF IN ANSWER TO SUPPLEMENTAL BRIEF OF DIRECTOR GENERAL

The Railroad Administration's assistant general counsel on behalf of plaintiff in error has filed a supplemental brief herein of 82 pages, discussing in great detail generally his ideas of the construction of the long and short haul clause of the 4th Section of the Act, and maintaining that no violation of the Act has been shown because there was no proof of shipments between the more distant points to which the lesser rate applied, and also maintaining that the Director General was not sub-

ject to the 4th Section of the Act to Regulate Commerce.

We will not attempt to discuss every particular angle of the attorney's discussion, as we will attempt to point out that the subjects which he discusses are in fact determined by the interpretation which this Court has already placed upon the 4th Section. It will be noted that the greater portion of counsel's supplemental brief is devoted to an attempt to secure an interpretation of the 4th Section to the effect that the mere publication of a lesser rate to the more distant point does not constitute a violation of the Interstate Commerce law, and that the higher rate to the intermediate point when published in the tariffs remains the only lawfully published rate to the intermediate point and must be charged notwithstanding the law says that no such charge shall be made and that no violation of the long and short clause of the 4th Section can exist until it is actually proven that shipments have been made to the more distant point at the lesser rate. It should also be noted that counsel's argument concedes that for any carrier other than the Director General when a shipment has in fact been shown to have been made to the more distant point it has violated the long and short haul clause and renders itself immediately liable to damages and to the criminal penalty, and that the measure of the damages is the difference in the rate charged to the intermediate point and the lesser rate charged to the more distant point, the latter concession being

diameterically opposed to the contention of counsel in the Director General's opening brief.

This interpretation of the long and short haul clause is diametrically opposed to the interpretation of the 4th Section by this Court in United States vs. Louisville & Nashville Railroad Co., 235 U. S. 314, pointed out and referred to in our former brief. To our mind, the decision in that case answers every phase of the discussion of the 4th Section contained in the supplemental brief, and the contention of the assistant general counsel of the Railroad Administration can only be sustained on the basis of the incorrectness of that decision. The 4th Section made it absolutely unlawful to charge or receive any greater compensation in the aggregate for the transportation of property for a shorter than for the longer distance over the same line or route in the same direction, the shorter being included within the longer distance. The first proviso provided that upon application to the Interstate Commerce Commission such common carrier may in special cases after investigation be authorized by the Commission to charge less than for the shorter distances. The second provisio reads: "Provided further that no rates or charges lawfully existing at the time of the passage of this amendatory act *shall be required to be changed* by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission in accordance with the provisions of this

Section until a determination of such application by the Commission." In the Louisville & Nashville case this Court interprets the prohibition of the section in connection with the provision as to no rates being required to be changed within six months, as absolutely prohibiting the existence of such rates after the expiration of that time, if at that time no application had been filed with the Commission to continue the same.

The language of this Court, speaking through the late Chief Justice White (235 U. S. Page 323), is: * * * "And for the purpose of making the prohibition efficacious, it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted" * * * The proviso that no changes were required to be made in the *rates or charges* lawfully existing until a certain time and on a certain contingency, taken in connection with the absolute prohibition of the section against that character of charges can certainly only be interpreted as absolutely prohibiting the existence of any such rates after the expiration of the time where no application had been made to continue them, and to require a change in any theretofore lawfully existing rate or charge of that character. Under the interpretation contended for by counsel in the supplemental brief there would have been no requirement on the part of the carrier to have changed a single rate, and such rates could have gone on forever, or until such time as someone had shipped to the

further point, but pending the shipment to the further point the higher rate to the intermediate point would be lawful and the carrier could have continued to charge the higher rate to the intermediate point without any penalty, either criminal or civil, until someone had made a shipment to the further point at the lesser rate. The taking effect of the prohibition certainly did not depend upon any such contingency. The carriers of the country certainly did not place any such interpretation upon the section, for they all, within the time limit, rearranged their schedule of rates to comply, or filed applications with the Commission for the right to continue.

Under counsel's contention, if a carrier should apply to the Commission for permission to charge less to the more distant point than to the intermediate point, and the Commission should deny the application, the carrier could go on charging the higher rate to the intermediate point without any penalty or without violating the section until there had been a shipment to the more distant point.

To our mind this contention is absurd. To illustrate, after the denial of the application by the Commission, the carrier could continue its rates on a higher basis to the intermediate point and if a shipment to the intermediate higher rate point is made, say on January 1st, there would be no violation of the Act and consequently no recovery. On January 3rd a shipment occurs to the more distant point at the lesser rate. There is still no violation of the Act as to the shipment on

January 1st, because at the time it was made there had been no shipment to the further point. On January 5th, however, another shipment is made to the intermediate point at the higher rate, but this is illegal because on January 3rd there had been a shipment to the further point at a less rate, and this notwithstanding there had been an order prior to any of the shipments denying to the carrier the right to charge more to the intermediate point.

It seems to us that no such possible interpretation of the Act can be made.

The prohibition of the 4th Section must necessarily apply to the establishment of the rate or charges in order to give effect to the various parts of the Act, for the carriers are required to establish and put their rates and charges into effect by filing and publication for a period of thirty days before such charges become effective. The public is bound to take notice of such filing and publication and any rates or charges established cannot be changed except by special permission without thirty days publication of such change. The higher charge to an intermediate point cannot be made without previous authority of the Commission after investigation, and the authorization of such higher charge must necessarily have preceded the filing of the tariffs.

The only reasonable interpretation therefore which can be placed upon the amendment of the 4th Section is that which has in fact been placed thereon by this Court, to-wit, that after the date named where no application was filed, the higher rate to the intermediate point ceased to exist. The assistant general counsel for the Railroad Administration realized that this Court's interpretation of this section was absolutely fatal to his contention. He cannot distiguish the case and he therefore flatly contradicts it and italicizes the contradiction thus: "With all due deference to the late Chief Justice, it *was not* 'enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted'. *It was merely enacted* that such rates *should be unlawful* for the future unless authorized by the Commission upon application" * * * (Page 22 of Assistant General Counsel's Supplemental Brief). He further tries to depreciate the effect of that decision by saying (page 23): "Indeed not the least remarkable aspect of what has come to be known as the Nashville Case, is the fact that no one has since been able to determine just how the late Chief Justice worked out a fourth section violation in that case" * * * This Court, speaking through the late Chief Justice was very particular to answer that very question on Page 323 of 235 U. S., in language beginning thus: * * * "To determine whether Section 4 is applicable requires a very brief consideration of the uncontroverted situation from which the rebilling privilege arose and upon the

existence of which it depended" * * * and very specifically points out the nature and effect of the rebilling privileges and wherein the rates there in question were a violation of the long and short haul cause. The Court was very particular also to refer to the fact (Page 325) that in the argument the matter had been put up as a question of preference or discrimination under Sections 2 and 3 of the Act, and not an inquiry under Section 4, but the Court said that notwithstanding this fact and disregarding immaterial considerations of form and looking to the substance of things, that it was a violation under Section 4, and again on Page 326 the Court says: "And it needs no argument to demonstrate that the application of the principle of public policy which the statute embodies is to be determined *by the substance of things, and not by names*, for if that were not the case the provisions of the statute would be wholly inefficacious, as names would readily be devised to accomplish such a purpose." Counsel further attempts to depreciate the effect of this decision by saying (Page 23 of Counsel's Supplemental Brief), that when the case went back to the Commission it was disposed of by the Commission considering it as a case under Section 3 and not under Section 4, and cites Duncan vs. N. C. & St. L. Ry. Co., 35, I. C. C. 477.

We have examined this opinion of the Commission and are at a loss to understand counsel's statement, for the opinion distinctly states that the case was back before the Commission not only as a preference under

Section 3, but upon applications of the carriers under Section 4, and the Commission states in its opinion that no facts had been adduced by the carriers under their application under Section 4, which would warrant the Commission in granting relief under that Section. The Commission also refers to the fact that additional applications had been made by the carriers involved in the Nashville Case with reference to the same and additional points and that upon a hearing upon such additional applications the matter would be further considered, but the opinion leaves no doubt that upon the showing upon the applications before the Commission in connection with the remand of the case that the 4th Section had been considered, and the decision was the denial of relief under Section 4 as well as under Section 3. Further reference is made by counsel in the supplemental brief that the Director General does not apprehend that this Court will seek to extend to the determination of the question of what was the legally applicable rate for the past, the language used by this Court with reference to the Commission's power for the future, "and which was, even in that connection of questionable accuracy." The language of this Court in the Nashville Case applies, we submit, to the interpretation of the 4th Section in all cases irrespective of whether it is specific as to rates for the future or rates in the past which have violated the Act. The language of the interpretation is that after a date fixed by the statute, certain character of rates cease to exist, to-wit, those charging a higher rate for the

intermediate haul than for the more distant haul where no application has been made and granted.

The language is neither "of questionable accuracy" nor does it apply more to rates that are to be charged in the future than to those that have been charged. It applies to all charges of the prohibited class.

We submit that the record in this case shows that the rates in question were attempted to be initiated after the expiration of six months after the amendment of the 4th Section of 1910, and that no application had been made to the Commission and no order granting permission to establish or charge any such rate to the intermediate point. Such rate had no force ad initio, and anyone who had been compelled to pay any higher rate than was established to the more distant point had his remedy by collection of the amount charged over that which the law said could be charged. It could make no difference under the interpretation placed on the statute in the Nashville Case whether the particular controversy referred to rates contemplated for the future or those which had been charged in the past. After the decision in the Nashville Case any shipper between the points in the Nashville Case who had been charged the higher rate than this Court said was lawful could recover the amount by which he had been charged illegally.

The interpretation of the 4th Section as contained in the Nashville Case automatically disposes of counsel's

contention that there was no violation of the Act until a shipment had been made and proven to the more distant point, for the higher intermediate rate never went into effect.

The only contention of counsel which is not disposed of by this decision is the contention that the Director General is not subject to the provisions of the 4th Section.

DIRECTOR GENERAL WAS SUBJECT TO THE FOURTH SECTION

It is argued in the supplemental brief that the Director General was not subject to the provisions of the Fourth Section. Section 10 of the Federal Control Act provides "That carriers while under federal control shall be subject to all laws and liabilities as common carriers whether arising under State or Federal law or at common law, except insofar as may be inconsistent with the provisions of the Act or any other Act appplicable to federal control, or with any order of the President. Actions at law or suits in equity may be brought by it against such carriers and judgment rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government" * * *

The argument of counsel that the Director General is not subject to the 4th Section is based entirely upon

the ground that the Director General was an agency of the Government. The provisions of the 4th Section were not inconsistent with the powers conferred upon the President, and in fact the Director General considered himself subject to that Section. He applied in all cases where he desired to depart from the 4th Section to the Commission for relief from that section, and while 4th Section Order No. 7361 was not and is not in the record in this case, it is quoted on page 84 of the supplemental brief and it appears from the second paragraph of the recitals that the Director General had applied for relief from the long and short haul clause in so far as it was necessary to permit the rates increased by General Order 28 to go into effect. The Interstate Commerce Commission considered the Director General subject to the 4th Section, as shown by its opinion in Johnson vs. A. T. S. F. Ry. Co. (51 I. C. C. 356), noted by counsel in his supplemental brief at page 78, in which the Commission directly held that the application of the 4th Section did not interfere with the unified co-ordinated national control or in anywise hinder the prosecution of the war. This decision was rendered early in the period of Federal control, to-wit, November 11th, 1918. Criticism of this decision is made by counsel, because it is contended that the Director General was not a party to the case, which counsel characterizes as "extraordinary". However in a case decided approximately at the same time, November 15th, 1918, and immediately following it in the report in the same volume at Page 364, in which the Director General was made

a party, and in which the Director General appeared by R. Walton Moore, the Director General apparently considered himself subject to the 4th Section, for he did not even request argument on this question or make any objection on the ground, and in the Commission's decision it reaffirmed its opinion on this identical question announced in Johnson vs. A. T. & S. F. Ry. and apparently throughout the period of Federal Control no objection was ever made as far as we have been able to discover, on the ground which counsel now refers to as extraordinary on the part of the Commission. The Director General considered himself subject to the 4th Section, acted thereon by applying for relief and raised no question as to his obligation to secure the order of the Commission in the event he desired to charge more for the shorter than for the longer haul over the same route.

In addition, we submit that the language of this Court in the case of Mo. Pac. vs. Ault, 256 U. S. 559, decided June 1st, 1921, interpreting Section 10, is very pertinent:

> "The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such right or remedies might interfere with the needs of federal

operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917, to cases where the cause of action arose before that date and the suit against the company was filed after it, and to cases where both cause of action and suit had arisen or might arise during federal operation. The government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analagous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.

"This purpose Congress accomplished by providing that 'carriers while under federal control' should remain subject to all then existing laws and liabilities and that they might sue and be sued as theretofore".

And again, at Page 560:

"The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or execution upon their property was precluded as inconsistent with the government's needs, the liability of the transportation system was to be enforced by allowing suit to be brought against whomever, as the party operating the same, was legally responsible under existing law, although it be the government.

"Thus, under Section 10, if the cause of action arose prior to government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the government, save for the immunity of the physical property from levy and the power of the President to regulate suits in the public interest as by fixing the venue, or the time for trial. If the cause of action arose while the government was operating the system, the 'carrier while under federal control' was nevertheless to be liable and suable. This means, as a matter of law, that the government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts" * * *

It is true in that case the Court held that the government was not liable for penalties under a state law, but was liable for damages which might reasonably in-

clude interest and costs, and this decision is examined and followed in the very recent case of Director General vs. Kastebaum, decided November 12, 1923, 44 Supreme Court Reporter, 52, wherein the Director General was held liable for damages for false imprisonment, and in that decision the Court, speaking through the chief justice, said:

> "The government under Section 10, in the case of false imprisonment stands exactly as if it were a railroad corporation operating as a common carrier. Such a corporation would clearly be responsible for an arrest of the kind here shown as without probable cause, and made by one of its detectives employed to protect the property entrusted to its care as a common carrier."

It is suggested on Page 77 of the supplemental brief as one of reasons why the 4th Section did not apply to the Director General was that competitive conditions were eliminated by federal control which were at the bottom of the evil aimed at during private control. That fact is more of an argument for the Director General being subject to the 4th Section than not, for the only reason for permitting a greater rate for the shorter haul was competitive conditions, and the elemination of competitive conditions eliminated any reason for the Director General establishing any higher rate for the shorter

haul, and hence is more of an argument in favor of the inhibition of the 4th Section against the Director General than of the fact that he could arbitrarily make a higher charge for the shorter haul than for the longer. It was certainly not the purpose of Congress to arbitrarily put in the hands of the Director General an instrument which with transportation competition eliminated could only be a means of killing business, and no such arbitrary power was certainly intended, for under the existence of federal control the only purpose of establishing such a rate would be to kill the business to the shorter point to the advantage of the longer point. The intent of the Federal Control Act was diametrically the opposite, for any rate established by the Commission was subject to the jurisdiction of the Interstate Commerce Commission—the only limitation upon it was that pending the investigation and decision the rate should not be suspended—it did not legalize the rate which might thereafter be found on investigation to be illegal, and it did not take out of the jurisdiction of the Court and place in the Commission jurisdiction of any question which had previously by existing law been lodged in a court.

The discussion of the supplemental brief is apparently made as a general discussion of the law without any particular reference to the record in this case. The dis-

cussion continually refers to the 4th Section order of the Interstate Commerce Commission, No. 7316, and the same is set out as an appendix to the brief. Neither this order nor the application thereof was offered in evidence and is not before this Court.

We respectfully submit that the judgment of the lower courts should be affirmed.

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